to them to decide. In the case of circumstantial evidence the position is different. Here the evidence must be such that, if it is believed, there is no reasonable alternative to the guilt of the accused. If it is anything less than this it is no case at all.

COURT OF CRIMINAL APPEAL.

H. A. Francis for the appellants.

L. Rayner for the Crown.

The facts appear sufficiently from the judgment of the Court of Criminal Appeal delivered by:—

Murray-Aynsley, J.: — In this case the two appellants were convicted under section 299 of the Penal Code.

The facts were rather unusual. The two appellants seem to have shared a room in an attap house in Aljunied Road. It appears that at about 7 one morning one Velu Dial or Dial Singh told one Tara Singh that he was going to collect the sum of $16 owed by the second appellant. At 7.30 he was seen near the room occupied by the appellants. At some time between 8.30 and 9 this man borrowed a bicycle from one Low Seng Chai who lived in McPherson Road. At about 9 o'clock one Channan Singh visited the appellants in their room. At about 9.30 Dial Singh arrived. At 12 noon all went to a toddy shop where they drank $16 worth and all got somewhat drunk but were still able to walk.

According to his story, Channan Singh parted from the appellants and met them later in the day. About 2.30 p.m. Velu Dial was found injured in the room of the appellants. The first appellant was present and said that Velu Dial had sustained the injuries in a fall which was obviously untrue. The second appellant was not present but when he was arrested at about 9.25 p.m. blood which was not his own but was of the same group as of Velu Dial was found on his clothing. There were signs of a struggle in the room. Later Velu Dial died from the injury received. The post mortem showed that death was due to a fracture of the skull caused by a blow from a blunt instrument. There was no certainty that more than one blow was struck.

Later in the afternoon one Kehr Singh met the two appellants together with Channan Singh at a cinema. According to Kehr Singh, Channan Singh said that they were going to fight the next day. The second appellant then said "never mind, if we fight to-morrow we will make it up". According to Channan Singh the first appellant had spoken of a quarrel with the deceased. Channan Singh had disappeared before the trial but his deposition was read.

The evidence showed that one of the two appellants might have struck the fatal blow. In the absence of the other there would have been a reasonable circumstantial case against the other. But the fact that there is evidence against both destroys the case against either of them. We have no means of knowing who actually struck the blow. Therefore neither can be convicted without evidence of common intention. Of this there is none. There is nothing in the evidence to suggest that death resulted from anything but a sudden quarrel between men who had been drinking heavily.

The case against the appellants was put carefully and accurately to the jury. We consider, however, that this is one of those cases in which the evidence, even if believed, did not constitute proof of the guilt of either of the appellants. Here it is necessary to distinguish between the effect of direct and of circumstantial evidence. Where there is direct evidence, however, slight, the jury are entitled to accept it and the case should be left to them to decide. In the case of circumstantial evidence the position is different. Here the evidence must be such that, if it is believed, there is no reasonable alternative to the guilt of the accused. If it is anything less than this it is no case at all.

The appeals were allowed and the convictions quashed.

Appeals allowed.

PUBLIC PROSECUTOR v. LEE LAM (f).

[App. Crim. Juris. (Wilson, J.) March 28, 1952]

[Selangor — Criminal Appeal No. 10 of 1952]

Emergency (Rubber Control) Regulations, 1949, Regulations 4 and 5 — Unlawful possession of rubber — Criminal Procedure Code, s. 173A.

The accused pleaded guilty to a charge of being in unlawful possession of 4 katties of scrap rubber. The Magistrate did not record a conviction but bound her over under section 173A of the Criminal Procedure Code. His reasons for so doing were:— (1) she had no previous conviction; (2) she was about 50 years old and had six small children (all in Court) to look after; (3) in addition her husband was an opium addict, sickly and was dependent on her; (4) there had been an absence of similar cases in the district for some time.

Held, the Magistrate had no authority to act under section 173A of the Criminal Procedure Code and should have imposed the minimum sentence of one year's imprisonment provided by law.

Cases referred to :—

(1) *Public Prosecutor v. Lim Chau Siu* (1951) M.L.J. 177.

(2) *Taylor & Anor. v. Saycell* (1950) 2 All E.R. 887.

CRIMINAL APPEAL.

D. M. K. Grant (D.P.P.) for the Public Prosecutor.

Respondent in person.

Cur. Adv. Vult.

Wilson, J. : — The accused was charged with, and pleaded guilty to, the following charges :—

"1. That you on 28th November, 1951 at 12.30 p.m. at Sedgely Estate in Kajang area did unlawfully possess 4 katties of scrap rubber valued at $2.40 cts. and thereby committed an offence under Regulations 4 and 5 L.N. 365/49.

"2. That you on 28th November, 1951 at 12.30 p.m. at Sedgely Estate Kajang did abet the commission of an offence of accepting of gratification other than legal remuneration to wit $10.00 in one ten-dollar note to S.C. 34653 Buyong bin Kidam as a motive to do an official act by requesting him to release you from arrest of an offence of possession unlawfully of 4 katties of scrap rubber which you have committed and thereby committed an offence under sections 116 and 161 Cap. 45."

The learned Magistrate has recorded :-

"In mitigation — husband sickly and cannot earn. Has 6 children all small — 48 years old."

He then proceeded to record :—

"Charge proved and on both charges. Bound over under section 173A in the sum of $500 — two sureties for two years."

The Public Prosecutor has appealed, so far as the first charge is concerned, on the ground that the learned Magistrate was wrong in acting under section 173A of the Criminal Procedure Code.

In the case of *Public Prosecutor v. Lim Chau Siu*[1], Storr, J., held that the provisions of section 294 (i) of the Criminal Procedure Code cannot have any application to a case where the Court has convicted a person under Regulation 4(1) of the Emergency (Rubber Control) Regulations, 1949, but he did express the opinion that in a case where the rubber involved was practically worthless due to its quality and quantity it would be quite proper for a Magistrate to act under section 173A of the Criminal Procedure Code. Section 173A provides :—

"If the Court finds that the charge is proved, but is of opinion that, having regard to the character, antecedents, age, health or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment, or that it is expedient to release the offender on probation, the Court may, without proceeding to record a conviction, make an order either dismissing the charge after a caution or discharging the offender conditionally on his entering into a bond with or without sureties."

In so far as the first charge is concerned, the High Commissioner in exercise of the powers conferred upon him by the Legislative Council by section 4 of the Emergency Regulations Ordinance, 1948, has enacted that any person who on or after the 6th October, 1950 is found guilty of being unlawfully in possession of rubber shall, on conviction, be punished by imprisonment for a term of not less than one year and not more than five years.

In this case the learned Magistrate found that both charges were proved but did not proceed to conviction and acted under section 173A of the Criminal Procedure Code. The question arises as to whether he was entitled to so act. In the case of *Taylor & Anor. v. Saycell*[2] the question arose as to whether the Court could in a case under the Road Traffic Act, 1930, avoid the effect of the compulsory disqualification of the offender for holding or obtaining a driving licence by an order conditionally discharging the offender under section 7(1) of the Criminal Justice Act, 1948. Goddard, C.J., stated in the course of his judgment :—

"We can see no ground here on which it can be said that it was proper to grant an order of conditional discharge for the purpose of avoiding disqualification."

He further stated :—

"Everyone recognises that the penalty of disqualification is severe. It often causes great hardship and, accordingly, it may be distasteful to a court to impose it, but it is a penalty which Parliament has imposed and has said is **prima facie** to be imposed in every case of this character and a court is only to refrain from imposing it if it can find special reasons for so refraining."

Similar principles must be applied by Magistrates when dealing with offences under section 4(1) of the Emergency (Rubber Control) Regulations, 1949, when a person charged has been found to be proved to have committed the offence. In any such case a Magistrate is bound to find the accused person guilty and sentence him to a term of not less than one year's imprisonment, unless he finds grounds for bringing the case strictly and literally within section 173A of the Criminal Procedure Code. In this case the learned Magistrate has given the following four reasons for his action for not convicting the accused and sentencing her to the minimum sentence of twelve months' imprisonment :—

(1) She had no previous conviction.

(2) She is about 50 years old and has six small children (all in Court) to look after.

(3) In addition, her husband is an opium addict, sickly and has been dependent on her.

(4) There has been an absence of such case in the district for quite some time.

I will deal with the first reason last. The second reason is one which naturally raised the sympathy of the Court but apart from the age of the accused it mentions none of the reasons referred to in section 173A of the Criminal Procedure Code which authorises the Court to act as it did. So far as the age of the accused is concerned I have seen her and I am of opinion that it is impossible to say that on account of her age it is inexpedient to inflict upon her any punishment. As to the third and fourth reasons given by the Magistrate for his action, it is perfectly clear that neither can amount to a valid reason for making an order under section 173A without proceeding to record a conviction. So far as the first reason is concerned, presumably the learned Magistrate, in recording that the accused had no previous conviction, was paying regard to the character of the accused. Whether or not the absence of a previous conviction, more particularly in a case in which the accused has pleaded guilty to a charge of bribery, is sufficient for a Magistrate to act under section 173A of the Criminal Procedure Code is not necessary for me to decide in this case. So far as this case is concerned the Legislative authority has laid it down that an accused person charged with an offence such as that alleged in the first charge shall be sent to prison for a period of not less than one year. If the Legislative authority had wished to say that such a person should not be sent to prison for this minimum period if he or she had no previous conviction, the Legislative authority would have so stated. Whilst I have every sympathy with the domestic circumstances of the accused person, I find it impossible to allow myself to be influenced by them. During the period of this Emergency the Executive and the Legislature alone can be fully aware of the reasons which make extraordinary legislation necessary. Judges and Magistrates are not in a position and are not entitled to query such legislation unless it can be found to be *ultra vires*. In these circumstances, the order of the learned Magistrate is quashed so far as the first charge is concerned, the sureties of the accused are discharged and I impose a sentence of one year's rigorous imprisonment and not simple imprisonment. This means that she will not remain idle in prison but will do such prison labour as she is capable of doing, and I have no reason to believe that any such labour will be injurious, though that is of course a matter for the Prison Medical Officer.

Order accordingly.

OOI PHEE KEAT v. KOK YOON SAN.

[Orig. Civ. Juris. (Wilson, J.) March 31, 1952]

[Kuala Lumpur — Civil Suit No. 182 of 1951]

Debtor and Creditor (Occupation Period) Ordinance, 1948 — Contract — Money lent during Japanese occupation on an I.O.U. endorsed: "In British or Allied Currency" — Admissibility of I.O.U. as proof of agreement — "In British or Allied Currency" — Construction of — Emergency (Finance) Regulations, 1939.

In 1944, while Malaya was under Japanese occupation, Lee, being in need of money, approached Ooi through a third party for a loan of $25,000. Lee gave an I.O.U. for that amount and endorsed on it "In British or Allied currency." On a suit brought by the personal representative of Ooi against the personal representative of Lee the defence raised that: (1) Under section 92 of the Evidence Ordinance 1950, as the I.O.U. was tendered in evidence no evidence could be given of any agreement that the loan was to be repaid dollar for dollar after the occupation; (2) If the loan was in fact made it must be revalued under section 6 of the Debtor and Creditor (Occupation Period) Ordinance, 1948; (3) The agreement was void for uncertainty in the phrase "In British or Allied currency"; (4) In any case the whole transaction was illegal being prohibited under regulation 3 of the Emergency (Finance) Regulations, 1939.

Held, that (1) following **Ooi Phee Cheng v. Kok Yoon San**[1], an I.O.U. though neither a promissory note nor a written agreement may be sufficient note or memorandum in writing to prove the existence of an agreement; (2) as the debt was expressly made payable otherwise than in occupation currency no revaluation was necessary; (3) "In British or Allied currency" means in such currency as might be established in Malaya after the period of occupation was ended, whether the re-occupying Power be British or an ally of Great Britain; (4) the Emergency (Finance) Regulations, 1939 were special regulations made by the British authorities in time of war to assist the British Empire and her allies in the war against their enemies and it cannot be said that such regulations can be held to have been in force during the period of occupation by an enemy Power.

Cases referred to:—

(1) *Ooi Phee Cheng v. Kok Yoon San* (1950) M.L.J. 187.

(2) *In re Garnett, Gandy v. Macaulay* (1886), 31 Ch. D. 16.

(3) *Mills v. Dunham* (1891) 1 Ch. D. 576.

(4) *Rannie v. Irvine* 7 Man. & G. 978.

(5) *Boissevain v. Weil* (1950) A.C. 327; (1950) 1 All E.R. 728.